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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

OCT -7 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHRISTOPHER R. ABEYTA,

Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF
ARIZONA,

Respondent,

CANYON STATE COURIER,

Respondent Employer,

SCF ARIZONA,

Respondent Insurer.

2 CA-IC 2008-0001
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20050-490345

Insurer No. 0501751

Thomas A. Ireson, Administrative Law Judge

AWARD AFFIRMED

Tretschok, McNamara & Miller, P.C.

By Patrick R. McNamara

Tucson
Attorneys for Petitioner Employee

The Industrial Commission of Arizona
By Laura L. McGrory

Phoenix
Attorney for Respondent

State Compensation Fund
By James B. Stabler and Bill H. Enriquez

Tucson
Attorneys for Respondents
Employer and Insurer

V Á S Q U E Z, Judge.

¶1 In this statutory special action, petitioner/employee Christopher Abeyta contends the administrative law judge (ALJ) erred by failing to award supportive care benefits to treat his industrial injury. Specifically, he asserts the ALJ abused his discretion by accepting the testimony of the respondents' doctor over his own doctor's and by using the wrong standard to assess the need for supportive care. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). On January 18, 2005, Abeyta, a truck driver for Canyon State Courier, suffered a stroke after unloading and loading heavy items onto a truck at work. Initially the respondent employer denied the claim but, after a hearing, ALJ Haley found the injury compensable. The award became final, and the respondent insurer issued a notice of claim status, closing Abeyta's claim with a permanent disability in October 2006.

¶3 In January 2007 Abeyta requested a hearing pursuant to A.R.S. § 23-1061(J) for supportive care benefits. Essentially he sought an award of his medications and future doctor visits as supportive care for the stroke. After the hearing was held on three successive dates, the ALJ denied relief, finding the supportive care sought was not related to the industrial injury. The ALJ affirmed his prior findings upon review. Abeyta then timely filed a writ of review.

Standard of Review

¶4 Although we defer to the ALJ's factual findings that are reasonably supported by the record, we independently review his legal conclusions. *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 10, 2 P.3d 691, 695 (2000). However, we will affirm the ALJ's resolution of conflicting opinions absent an abuse of discretion. *Id.*

Discussion

¶5 Preliminarily, we note the respondents argue that Abeyta's claim was closed without a supportive care award and that these proceedings are an attempt to reopen the award to obtain supportive care, which would require Abeyta to prove his condition had changed after his claim was closed. *See* A.R.S. § 23-1061(H) (claim may be reopened upon "new, additional or previously undiscovered temporary or permanent condition"); *see also Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 15-16, 695 P.2d 261, 264-65 (1985). Because we reject Abeyta's claim on other grounds, we need not address this argument, which was not raised below.

¶6 Abeyta first argues the ALJ abused his discretion by accepting the opinion of Dr. Kahn over that of Abeyta's own physician, Dr. Pellerito. He contends Kahn's opinion lacked foundation because he "did not accept the res judicata effect of . . . [ALJ] Haley['s] decision that [Abeyta]'s work activities . . . contributed to [his stroke]," and therefore the ALJ should have rejected it. We note "an expert's medical testimony may become so diminished by proof of an inaccurate factual background" that the ALJ commits reversible error by relying upon it. *Kaibab Indus.*, 196 Ariz. 601, ¶ 23, 2 P.3d at 698.

¶7 In the original proceedings, ALJ Haley had found Abeyta's work activities were a contributing cause of the stroke and the injury was thus compensable, notwithstanding that Abeyta's preexisting diabetes also made him more susceptible to a stroke. *See Div. of Vocational Rehab. v. Indus. Comm'n*, 125 Ariz. 585, 588, 611 P.2d 938, 941 (App. 1980) (employer takes employee as he finds him). This award was not challenged and became final and binding upon the parties. *See Brown v. Indus. Comm'n*, 199 Ariz. 521, ¶ 17, 19 P.3d 1237, 1241 (App. 2001). Thus, in later determining whether supportive care was required, the doctors were required to accept as true the ALJ's finding of a relationship between Abeyta's work activities and industrial injury.

¶8 However, at the supportive care hearing, Dr. Kahn testified that, "from a medical perspective, [Abeyta]'s stroke was caused by the diabetes. . . . If it's been accepted as an industrial responsibility, then I work within that framework, and I don't challenge the Judge's perspective that the stroke was caused by the diabetes." Abeyta argues these

statements demonstrate that Kahn’s opinion that supportive care was not required was based on his failure to accept that the stroke was an industrial injury. We disagree. When viewed in context, it is clear that Kahn misspoke when he suggested that ALJ Haley had concluded the stroke was caused by the diabetes.

¶9 During cross-examination, Kahn indicated that, although from a medical perspective the underlying diabetes caused Abeyta’s stroke, he was aware the stroke had been deemed a compensable injury. He further explained, “[W]hen I went on to address the issues, they are addressed with my understanding that . . . the stroke was accepted as an industrial responsibility. So, . . . any opinions that I have are based upon the framework that the stroke was accepted as an industrial responsibility.” Thus, on this record we cannot say the trial court erred in adopting Kahn’s medical opinions as correct, because Kahn testified they were based on Abeyta’s stroke having been deemed a compensable industrial injury. Kahn’s testimony was therefore supported by adequate factual and legal foundation. *See Desert Insulations, Inc. v. Indus. Comm’n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982) (testimony lacked adequate foundation where opinion based on inaccurate factual background).

¶10 Abeyta next argues that Kahn’s opinion confused active care with supportive care and, therefore, in adopting Kahn’s opinion, the ALJ “use[d] the wrong standard to determine if supportive care [was] required.” As best we can understand this argument, Abeyta appears to suggest Kahn’s opinion that the stroke “was a finite event and cannot be

treated” is predicated on the same belief—that the stroke was caused solely by the diabetes—and therefore lacks foundation. Thus, he contends, Pellerito’s testimony was the only testimony the ALJ could find credible, and the ALJ should have accepted Pellerito’s opinion that supportive care was required due to the increased risk of future stroke that the initial stroke created. But, even if the ALJ had considered Dr. Pellerito’s testimony alone, that testimony does not justify a supportive care award in this instance.

¶11 Section 23-1062(A), A.R.S., requires that “every injured employee shall receive . . . benefits[,] . . . treatment, . . . [or] medicine . . . reasonably required at the time of the injury, and during the period of disability.” Therefore, the “essential question in determining supportive care benefits is whether the employee needs ongoing treatment ‘to prevent or reduce the continuing symptoms of an industrial injury after the injury has become stab[il]ized.’” *Brown*, 199 Ariz. 521, ¶ 14, 19 P.3d at 1240, *quoting Capuano v. Indus. Comm’n*, 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986). To receive an award for supportive care, “the claimant ha[s] the burden of proving the continuing industrial effect upon the condition in order to be entitled to future . . . benefits.” *Capuano*, 150 Ariz. at 226, 722 P.2d at 394.

¶12 Dr. Pellerito testified at the review hearing that Abeyta was at risk for a future stroke and that the recommended medications would reduce this risk. He further testified that Abeyta had some ongoing residual neurological deficits from the stroke, but none of the recommended medications were intended to reduce these deficits. In fact, Pellerito stated

that the medications were designed to treat and stabilize Abeyta's underlying conditions of diabetes and high blood pressure; he did not relate the medications to the effects of the prior stroke itself.

¶13 However, Pellerito did testify that “[Abeyta is] still at high risk of cardiovascular event, in particular another stroke. He had one stroke, it puts him at risk for a second one. Also, people who have underlying problems of high blood pressure and diabetes . . . are at higher risk for heart attack.” Considering this testimony, the ALJ stated that “Pellerito’s testimony could be interpreted as opining the stroke itself added to the risk of a further stroke. However, he offered no explanation to support his opinion beyond the claimant’s pre-existing risk factors.” We agree.

¶14 To establish that supportive care was warranted, Abeyta needed to demonstrate that the medications would treat symptoms he continued to experience as a result of the work-related stroke. *See Capuano*, 150 Ariz. at 226, 722 P.2d at 394. And Pellerito’s mere statement that having a first stroke puts one at greater risk of having a second does not explain how the medications sought would reduce the increased risk as it is solely attributable to the first stroke. His testimony only established that the medications reduce the risk of a second stroke as that risk is associated with his underlying, preexisting conditions. Therefore, we cannot say Pellerito’s testimony standing alone would have met Abeyta’s “burden of proving the continuing industrial effect upon the condition” in order to entitle him to a supportive care award. *Capuano*, 150 Ariz. at 226, 722 P.2d at 394.

¶15 Furthermore, as we have already stated, Kahn’s testimony was supported by adequate foundation. To the extent Abeyta suggests Kahn’s opinion that the stroke could not be treated further was factually incorrect, we note that this issue was not disputed by Pellerito. In fact, when asked if the medications could treat the part of Abeyta’s brain that was affected by the stroke, Pellerito stated, “Well, I don’t know I can say that. I’m not sure they’ve done definite studies to prove that. But they have performed studies that show that prescribing these medications . . . may prevent future events.”

¶16 Considering all the evidence, the ALJ found no real factual dispute between Kahn and Pellerito, except to the extent they differed on whether a prior stroke can, by itself, create a greater risk of a second stroke. On this issue, Kahn testified that “an individual that has had one stroke is always at risk for subsequent strokes because the risk factor for the stroke always remains, which is the underlying diabetes So that is the risk factor for subsequent vascular events.” Ultimately the ALJ concluded: “Assuming *arguendo* there is a material conflict on this issue and without a clear explanation to contrast with Dr. Kahn’s opinion [that the stroke itself did not increase the risk of a further event], the opinion of Dr. Kahn is adopted.”

¶17 “[I]t is the duty of the ALJ to resolve conflicts in the evidence and determine which opinion is more probably correct[,]” and “we are bound by his resolution of conflicting testimony.” *Kaibab Indus.*, 196 Ariz. 601, ¶ 25, 2 P.3d at 699. We therefore cannot say the ALJ abused his discretion by accepting Kahn’s testimony over Pellerito’s and

finding Abeyta had failed to prove the proposed treatment was “reasonably required” to prevent or reduce symptoms of his industrial injury rather than its underlying conditions. § 23-1062(A); *see Capuano*, 150 Ariz. at 226, 722 P.2d at 394; *see also Brown*, 199 Ariz. 521, ¶¶ 15, 17, 19 P.3d at 1240-41 (acknowledging in dicta error in supportive care award of medications for heart attack when heart attack resolved and medications intended to treat underlying atherosclerosis only).

¶18 The award is affirmed.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge